SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. [redacted] 88

MRS. LESLIE F. SLADE, ET AL.,
Petitioners,

vs.

SHELL OIL COMPANY, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MARCELLUS GREEN,
ROSS R. BARNETT,
P. Z. JONES,
GARNER W. GREEN,
Counsel for Petitioners.

FRANK F. MIZE,
Forest, Miss.;
GREEN & GREEN,
Jackson, Miss.;
BARNETT, BARNETT, JONES & STONE,
Jackson, Miss.,
Of Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. Leslie F. Slade, widow, for herself, individually, and her daughter, Helen Jane Slade, a minor, called plaintiff or petitioners, as against Shell Oil Company, Inc., called defendant, and Pacific Indemnity Company, surety on its appeal bond from the District Court, herein called respondents, show:

A.

Summary Statement of Matters Involved.

1. The suit. This was in the Federal District Court, Jackson, Mississippi, for the wrongful death of Leslie F.

Slade, husband and father of petitioners, respectively, wherein the judgment was for $35,000.00.

The time. The accident happened at approximately 7:15 A. M., March 4, 1940, in an artificial fog created wrongfully by defendant, and is the first case almost wherein the fog was a cause—not a condition.

The place. Near Norco, Louisiana, on United States transcontinental Highways Numbers 51-61, known as "the Airline", leading into New Orleans, very extensively traveled, and constructed in 1934.

Defendant's wrong. This was the wrongful creation over the highway of an artificial fog, which varied from time to time in intensity, being at times absolutely so thick as to preclude any visibility. Defendant operated a large oil refinery abutting the highway for many years, wherein there was distillation of crude petroleum, heated to as high as 950°, with condensation, with water as the cooling agency. The water having absorbed the heat—there being no cooling towers,—was discharged into an open ditch at the rate of 8,000 gallons per minute, going to, under, across, and along the highway. This superheated water gave off vapor and steam, and, under climatic conditions prevalent in that part of Louisiana, had frequently theretofore caused very dense fogs over the highway, the character appearing in the Parish newspapers as early as 1934 thus:

> "Some lost their way in densest fog——
> The Norco, steam-made kind——".

Defendant did naught between 1934, when the Air Line Highway was opened, and March, 1940, to rectify the cause, which was in total disregard of the lives of those lawfully traveling the highway.

The facts of the accident. Defendant's fog, variant and varying, was present over the highway, which then consisted of two paved traffic lanes on a dump, wide enough for a

four-lane highway. From this dump defendant constructed a road into its plant and adjacent to the hot-water ditch. A truck, identified herein solely as the "chicken truck", moving east—the highway running east and west,—lost its way, its driver parking on the south side of the pavement to clear his windshield, presumably. Simultaneously, the L. & A. truck, driven by Arnold, moving west, was on the extreme south of the dump, seeking to turn into defendant's plant on the gravel road. Going east, on the proper side, was the Greer truck, which, finding the fog, took to the south shoulder, and, in dodging the L. & A. truck, overturned between the Arnold and the chicken trucks. Whereupon, Slade, who was a short distance behind Greer and driving with due care a 32-foot tractor and trailer combination motor vehicle, in interstate commerce, entered the fog, his right wheels left the pavement (R. 182), struck the overturned truck in the fog, his trailer, heavily loaded, broke the connecting pin and crushed his cab from the rear, killing him instantly.

Apparently, Slade, in leaving the pavement, was doing exactly as the law of Louisiana and as the rules of the Interstate Commerce Commission required him to do when he was confronted by this fog, assuming he was going to stop by reason of there being "no visibility". That is to say, he knew it was practicable to take to the shoulder and clear the pavement of his truck, and he knew it was against the rules for him to stop and park upon the pavement. Slade, in doing as required by the State and Federal laws, collided with the overturned truck before he had reached a point on the shoulder (R. 182) sufficient to clear the pavement of his truck and trailer,—32 feet overall length. Slade, of course, is dead. What his intentions were, no man can tell, but the presumption, under the law is, as hereinafter shown, that the course by him pursued was dictated by a desire to live, and that he was in the exercise of due care. Certainly, going

on the shoulder, which was approximately twenty-nine feet wide, indicated strongly a desire to avoid injury by driving carefully. Compare, Appendix "A", where Rule 15, Act 286, Laws 1938 of Louisiana, and Rule 2.22, Safety Regulations of the Interstate Commerce Commission, are printed in parallel columns.

The pleadings. Pursuant to Rule 8, plaintiff's complaint contained a full factual statement showing in Count One liability potentially to exist because of (a) negligence, (b) nuisance, and (c) gross negligence tantamount to wantonness and wilfulness. In Count Two, the factual averments of Count One were adopted, but liability was definitely predicated upon an alleged nuisance (R. 1-10):

After a bill of particulars had been supplied by petitioners on defendant's demand, the case was tried.

The trial. After an elaborate hearing, the District Judge instructed a verdict for defendant as to the second count "for the reason that there is no evidence of any nuisance" (R., 531), but, under charges, submitted the case. Whereupon, verdict was returned, the District Judge refused to vacate, and, upon appeal, solely on the ground that contributory negligence was conclusively shown, the judgment was reversed in an opinion by Circuit Judge Hutcheson, Circuit Judge Sibley concurring. Circuit Judge Holmes dissented, declaring:

> "Different inferences might be drawn by fair and reasonable men as to the density of the fog and as to whether it was negligence to move within it at a speed not exceeding ten miles per hour. The District Court did not err in refusing to decide, as a matter of law, that Slade was negligent in proceeding into a thin fog that suddenly became dense after he had traveled a short distance."

B.

Reasons Relied Upon for the Allowance of the Writ.

1. Contrary to *Illinois C. R. Co.* v. *Moore,* 312 U. S. 630, 85 L. ed. 1089, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 61, the majority opinion disregarded, without reference, the controlling decisions of Louisiana (*Gaiennie* v. *Cooperative Produce Co.,* 196 La. 417, 199 So. 377, 610, Appendix "B", and other cases), when it vacated the jury's verdict, which verdict properly established, in accordance with Louisiana law, defendant's liability.

Said opinion assumed to settle an important principle of Louisiana law in palpable conflict with the controlling Louisiana statutes, as interpreted by the Supreme Court of that state.

2. The majority opinion in the Court of Appeals, in construing questions of Louisiana law, decided substantial questions of state law in a way which probably conflicts with the applicable Louisiana decisions,——

(a) As to the burden of proof as to contributory negligence. *Buechner* v. *New Orleans,* 112 La. 599, 36 So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455 (frequently approved, compare *Oliphant* v. *Lake Providence,* Ct. App., 2d Cir., 139 So. 516-524); *Palmer* v. *Hoffman,* 63 S. C. 477, 87 L. ed. 427.

(b) The decedent is "conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corporation,* (Ct. App., 2d Cir., (5 So. 2d, 45; *Aymond* v *Western U. Tel. Co.,* 151 La. 184, 91 So. 671.

(c) An estimate "by the occupants of an auto towards which the other car is coming * * * has no probative

value * * *." *Mutti* v. *McCall,* (Ct. App., 1st Cir.), 130 So. 229, 230.

(d) Weight and sufficiency of the evidence are solely for the jury.

3. The Court of Appeals, in the majority opinion, has "so far departed from the accepted and usual course of judicial proceedings" that certiorari should be granted:

(1) Because of violation of the Seventh Amendment as to jury trials;

(2) Contributory negligence, under the majority opinion herein rendered, may not be judicially established, as by the opinion affirmatively shown.

4. The majority opinion further assumes to settle an important principle of Federal law, not precedently decided here, adversely determined.

Under Rule 8 (Appendix "C") for the District Courts, plaintiff stated all facts in Count One, and therein demanded judgment for an injury predicatable upon (a) negligence, (b) absolute nuisance, and (c) possible wantonness and wilfulness. Plaintiff likewise added Count Two, reaverring facts set out in Count One by reference, and therein counted upon legal liability arising from absolute nuisance, consisting in the creation and maintenance of an impenetrable fog on a transcontinental highway. The District Judge directed a verdict for defendant on the Second Count for want of evidence, but submitted the cause to the jury on the facts. The jury found for plaintiff by reason of defendant's creation and maintenance of the fog. Plaintiff did not appeal from the direction of the verdict as to the nuisance, that is, creation and maintenance of the fog, but defendant did. Plaintiff did not cross appeal, resting his recovery, however, upon the creation and maintenance of the fog,—obviously a nuisance.

Now, notwithstanding the Court of Appeals admits the creation and maintenance of the fog, whereto contributory negligence is not a defense, it has remanded the cause for a new trial, whereunder plaintiff is to be precluded from relying upon absolute liability arising from the nuisance and possible wanton, wilful injury.

The Court of Appeals, under Rule 8, having jurisdiction of the entire controversy, should have remanded the cause for a trial on all of the facts, giving plaintiff the right to recovery, if entitled thereto, because of (a) negligence, (b) absolute nuisance, and (c) wilfulness and wantonness, and when, upon a case perfectly proved, contributory negligence was made a defense by the Court of Appeals and plaintiff's rights divested, wrongful construction of Rule 8 was had.

5. Where a driver of a motor truck, engaged in interstate commerce, has fully complied with Interstate Commerce Safety Rules and not thereunder been guilty of contributory negligence under a jury verdict, the state in which the death happened may not prescribe a rule of law as to contributory negligence which will defeat an action for wrongful death, the rules prescribed by the Interstate Commerce Commission being the supreme law of the land and exclusive of state authority.

6. And for other reasons appearing and to be assigned at the hearing.

WHEREFORE, petitioners pray for writ of certiorari from this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain therein named, a full and complete transcript of the record and all proceedings in the cause numbered 10353 and entitled *Shell Oil Company, Inc.* v. *Mrs. Leslie F. Slade,* et al., and that said judgment of the

said Court may be reversed and petitioners afforded appropriate relief.

Respectfully,

MARCELLUS GREEN,
ROSS R. BARNETT,
P. Z. JONES,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioners.

FRANK F. MIZE,
Forest, Miss.;
GREEN & GREEN,
Jackson, Miss.;
BARNETT, BARNETT, JONES & STONE,
Jackson, Miss.,
Of Counsel.